

SEP 25 1976

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

**EWALD B. NYQUIST, Commissioner of Education of the
State of New York, et al.,**

Appellants,

v.

JEAN-MARIE MAUCLET,

Appellee,

and

**EWALD B. NYQUIST, Commissioner of Education of the
State of New York, et al.,**

Appellants,

v.

ALAN RABINOVITCH,

Appellee.

**On Appeal from the United States
District Courts for the Eastern and
Western Districts of New York**

**MOTION TO DISMISS OR AFFIRM ON
BEHALF OF JEAN-MARIE MAUCLET**

**KEVIN KENNEDY
1520 Genesee Building
Buffalo, New York 14202
716-856-9090**

**MICHAEL DAVIDSON
418 John Lord O'Brian Hall
State University of New York
Buffalo, New York 14260
716-636-2071**

*Attorneys for appellee
Jean-Marie Mauclet*

TABLE OF CONTENTS

	Page
Motion to Dismiss or Affirm	1
Conclusion	4

APPENDIX

Judgment	1a
Notice of Appeal	2a

In The
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the
State of New York, et al.,

Appellants,

v.

JEAN-MARIE MAUCLET,

Appellee,

and

EWALD B. NYQUIST, Commissioner of Education of the
State of New York, et al.,

Appellants,

v.

ALAN RABINOVITCH,

Appellee.

On Appeal from the United States
District Courts for the Eastern and
Western Districts of New York

**MOTION TO DISMISS OR AFFIRM ON
BEHALF OF JEAN-MARIE MAUCLET**

Appellee, Jean-Marie Mauclet, moves pursuant to Rule 16 of this Court for dismissal of the appeal from the judgment of the United States District Court for the Western District of New York, entered February 11, 1976, or, in the alternative, for affirmance of that judgment. The February 11 judgment, the only judgment entered in appellee Mauclet's action, was not printed in appellant's jurisdictional statement. It is reprinted

here on page 1a. Appellant's notice of appeal from the February 11 judgment, dated March 12, 1976, the only notice of appeal filed in the Western District, was also not printed in the jurisdictional statement. It is reprinted here on page 2a.

1. Although appellant Nyquist took a timely appeal from the February 11, 1976 judgment entered in appellee Mauclet's action, appellant has failed to docket an appeal on time or seek an extension of time within the Court's rules. Although the timely docketing of an appeal is not a jurisdictional requirement, *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 446 fn. 4 (1974), dismissal is warranted when an appeal is docketed belatedly and there is neither an application to enlarge time nor an explanation at the time docketing. *Pittsburgh Towing Company v. Mississippi Valley Barge Line Company*, 385 U.S. 32, rehearing denied 385 U.S. 995 (1966).

Appellees Rabinovitch and Mauclet, separately represented, began their individual actions in the Eastern and Western Districts of New York, respectively. Both appellees requested the convening of three judge courts, and the Chief Judge of the Court of Appeals for the Second Circuit designated a panel consisting of Judge Curtin, Chief Judge of the Western District, Judge Judd of the Eastern District, and Judge Van Graafeiland of the Court of Appeals. For the purpose of the Mauclet action, Judge Judd was designated to be a judge of the Western District; for the purpose of the Rabinovitch action, Judge Curtin was designated to be a judge of the Eastern District. The motions for summary judgment were heard together, and a single decision was rendered. Nevertheless, the actions remained as separate proceedings within the districts in which they were commenced. A judgment in respect to appellee Mauclet was entered in the Western District on February 11, 1976, and an appeal filed on March 12, 1976. A separate judgment was entered in the Eastern District on March 29, 1976, and an appeal was filed on May 28, 1976. Although the March 29 judgment refers to both actions it was filed only in the

Rabinovitch action in the Eastern District, and was never filed in the Western District. A comparison of the February 11 and March 29 judgments shows that the latter does not amend the former in respect to appellee Mauclet.

By the time appellees moved in this Court, on July 19, 1976, to enlarge their time to docket the appeal, their time to act in respect to the February 11 judgment and their March 12 appeal had long since passed. However, appellants failed to inform the Court in their motion of the earlier and separate judgment and appeal. They then failed to explain in their jurisdictional statement the untimely docketing of their appeal from the February 11 judgment. In fact, they failed to even reprint or refer to the February 11 judgment and March 12 appeal in their jurisdictional statement. It may fairly be argued that appellees, to this date, have not docketed their appeal in respect to the February 11 judgment. At best, their jurisdictional statement is untimely. This Court should dismiss the appeal insofar as it concerns appellee Mauclet on the ground that appellants have failed to comply with the rules of this Court.

2. On the merits, appellee Mauclet endorses and incorporates the arguments in the Motion to Affirm on Behalf of Alan Rabinovitch. The only point to be added is that appellee Mauclet's claim for financial relief was narrower than Mr. Rabinovitch's. Mr. Mauclet requested only that he be made eligible for state financial assistance for the academic year in which he commenced his action, and for succeeding years, but not for any prior year. The district court granted Mr. Mauclet all the relief he sought, and for that reason he did not join in Mr. Rabinovitch's appeal. Otherwise, Mr. Mauclet's position is in full accord with that of Mr. Rabinovitch.

Conclusion

For the foregoing reasons, the appeal from the judgment in appellee Mauclet's action should be dismissed, or, in the alternative, the judgment should be affirmed.

Respectfully submitted,

KEVIN KENNEDY
1520 Genesee Building
Buffalo, New York 14202
716-856-9090

MICHAEL DAVIDSON
418 John Lord O'Brian Hall
State University of New York
Buffalo, New York 14260
716-636-2071

*Attorneys for appellee
Jean-Marie Mauclet*

Dated: September 22, 1976

APPENDIX

1a

JUDGMENT

**UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK**

JEAN-MARIE MAUCLET

vs.

**EWALD B. NYQUIST, Commissioner of Education of the
State of New York**

Civil Action File No. 75-73

This action came on for hearing before the Court, Honorable Ellsworth A. VanGraafeiland, Orrin G. Judd and John T. Curtin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that Section 661(3) of the New York Education Law is unconstitutional and defendants are enjoined from its enforcement. Defendants are directed to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit.

Dated at Buffalo, New York, this 11th day of February, 1976.

JOHN K. ADAMS
Clerk of Court

NOTICE OF APPEAL

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

JEAN-MARIE MAUCLET,

Plaintiff,

against

**EWALD B. NYQUIST, Commissioner of Education of the
State of New York, and NEW YORK HIGHER
EDUCATION SERVICES CORPORATION,**

Defendants.

Civ-75-73

**NOTICE IS HEREBY GIVEN, that the above-named
defendants hereby appeal to the Supreme Court of the United
States from the final order and judgment of this Court entered
February 11, 1976, which, *inter alia*, declared New York
Education Law § 661(3) unconstitutional and enjoined its
enforcement.**

This appeal is taken pursuant to 28 U.S.C. § 1253.

LOUIS J. LEFKOWITZ

Attorney General of

the State of New York

Attorney for Defendants

By: ROBERT S. HAMMER

ROBERT S. HAMMER

Assistant Attorney General

Office & P.O. Address:

Two World Trade Center

New York, N. Y. 10047

Tel. No. (212) 488-3394